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INDEX

	Page
Motion for Leave to File a Brief Amici Curiae	iii
Brief Amici Curiae	1
Introduction and Statement of the Case	1
Argument	4
Conclusion	9

CITATIONS

CASES:

Craig v. *Boren*, ____ U.S. ____, 45 U.S.L.W. 4057	5
Geduldig v. *Aiello*, 417 U.S. 484	iv
General Electric Co. v. *Gilbert*, ____ U.S. ____, 45 U.S.L.W. 4031	iv
Gonzalez v. *Automatic Employees Credit Union*, 419, U.S. 90	6, 7, 9
Griggs v. *Duke Power Co.*, 401 U.S. 424	5
Hagans v. *Lavine*, 415 U.S. 528	5, 7, 8, 9
Liberty Mutual Life Ins. Co. v. *Wetzel*, 424 U.S. 737	iv
MTM, Inc. v. *Baxley*, 420 U.S. 799	5, 6, 7, 8, 9
Philbrook v. *Glodgett*, 421 U.S. 707	5, 7, 8, 9
Reed v. *Reed*, 404 U.S. 71	5
Swift & Co. v. *Wickham*, 382 U.S. 111	5
Washington v. *Davis*, ____ U.S. ____, 44 U.S.L.W. 4789	2, 5

Page

STATUTES AND RULES:

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ..... v, 2, 3, 4, 5, 6, 8, 9
§ 703, 42 U.S.C. § 2000e-2 2
§ 703(e), 42 U.S.C. § 2000e-2(e) ..... iv, 1

United States Supreme Court Rules
Rule 40(1)(d)(2) 2
Rule 42 iii

28 U.S.C. § 2281 ..... 3, 4, 5, 9

42 U.S.C. § 1983 2

Pub. L. 94-381 (Aug. 12, 1976), 90 Stat. 1119 et seq.
§ 1 3
§ 7 3

Supreme Court of the United States

October Term, 1976

No. 76-422

E. C. DOTHARD, *et al.*,

Appellants,

v.

BRENDA M. MIETH, *et al.*,

Appellees.

MOTION BY WOMEN'S LEGAL DEFENSE FUND AND AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Women's Legal Defense Fund and the American Federation of Labor and Congress of Industrial Organizations hereby respectfully move for leave to file the attached brief *amici curiae* in the instant case, as provided for in Rule 42 of the Rules of this Court. Counsel for appellees have consented to the filing of that brief, but counsel for appellants have refused such consent. This motion and the attached brief are timely filed.

INTEREST OF THE AMICI CURIAE

Women's Legal Defense Fund ("Fund") is a non-profit, tax-exempt corporation founded in 1971 to secure equal rights for women, by providing volunteer legal representation in cases raising sex discrimination issues. The Fund also sponsors informational and educational activities on

legal issues of special interest to women. Many of the activities of the Fund involve employment discrimination against women.

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 109 national and international unions, having a total membership of approximately 14,000,000 men and women. Women comprise a substantial portion of the membership of AFL-CIO affiliated unions. The AFL-CIO has appeared previously before this Court representing the interests of women union members in equal employment rights. See e.g., *Geduldig* v. *Aiello*, 417 U.S. 484; *Liberty Mutual Life Ins. Co.* v. *Wetzel*, 424 U.S. 737; *General Electric Co.* v. *Gilbert*, ... U.S. ....., 45 U.S.L.W. 4031 (Dec. 7, 1976).

THE ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The issues on the merits of this case are, first, whether a state height and weight limitation for employment as a prison guard may be maintained where it has the effect of excluding substantially more women than men and where no business necessity has been shown and, second, whether sex is a bona fide occupational qualification ("bfoq"), within the meaning of § 703(e) of Title VII of the Civil Rights Act of 1964, for employment in certain prison guard positions. Both of these issues are important; the second, in particular, requires elucidation of the bfoq defense, a task this Court has not heretofor undertaken and which could have a substantial impact upon the course of litigation involving employment discrimination against women.

Each of the present *amici*, in light of the importance of the issues presented, were prepared to file a brief *amicus*

curiae addressing those questions. On examining the Jurisdictional Statement and the opinion below, however, the present *amici* concluded that the case was not properly before this Court on direct appeal from a three-judge court, since the issues on appeal at this time raise only questions concerning the application of Title VII; there are no constitutional questions remaining in the case. Because we believe this case would benefit from full airing before the Court of Appeals for the Fifth Circuit, and because we believe the appeal should properly have been taken to that Court, we file this brief *amici curiae*, limited to the question whether this Court has jurisdiction over the present appeal. It is our understanding that neither the appellees nor any *amici* appearing on their behalf will cover this question.

CONCLUSION

Because the attached brief covers a jurisdictional question not addressed by the parties, this Motion for Leave to File a Brief *Amici Curiae* should be granted.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1976

No. 76-422

E. C. DOTHARD, *et al.*,

Appellants,

v.

BRENDA M. MIETH, *et al.*,

Appellees.

BRIEF FOR THE WOMEN'S LEGAL DEFENSE FUND AND AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICI CURIAE

This brief amici curiae is filed by the Women's Legal Defense Fund ("Fund") and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), contingent on the granting of the foregoing motion to file a brief as *amici curiae*.

INTRODUCTION AND STATEMENT OF THE CASE

The issues on the merits of this case are, first, whether a state height and weight limitation for employment as a prison guard may be maintained where it has the effect of excluding substantially more women than men and where no business necessity has been shown and, second, whether sex is a bona fide occupational qualification ("bfoq"), within the meaning of § 703(e) of Title VII of the Civil Rights Act of 1964, for employment in certain prison guard

positions.[1] Both of these issues are important; the second, in particular, requires elucidation of the bfoq defense, a task this Court has not heretofor undertaken and which could have a substantial impact upon the course of litigation involving employment discrimination against women.

It is the conviction of the Fund and the AFL-CIO, however, that the present appeal is not properly before this Court. Rather, the appeal ought to have been taken to the Court of Appeals for the Fifth Circuit. To understand why this is so, some recapitulation of the procedural history of this case is necessary.

This case was filed by two women, Ms. Mieth and Ms. Rawlinson, each seeking to represent a class of similarly situated women. (J. App. 16, 20, 27).[2] Ms. Mieth was interested in a position as a state trooper for the State of Alabama. (J. App. 20). She met all the job prerequisites for the position except one: she was not "at least 5 feet 9 inches in height and [did not] weigh 160 pounds." (J. App. 18, 20). Ms. Mieth did not conform with the procedural steps required prior to filing a suit under 42 U.S.C. § 2000e-2, Title VII of the Civil Rights Act of 1964. Consequently, her suit arose only under 42 U.S.C. § 1983, for violation of equal protection of the laws under the Fourteenth Amendment (J. App. 32).

[1] The Jurisdictional Statement was limited to these questions. In their Brief on the merits, appellants have raised several other issues, including the constitutionality of Title VII as applied to the states and generally. (Br. for Appellants, at 2-3). These additional issues are not fairly included within the questions presented in the Jurisdictional Statement and, we trust, will be disregarded in accord with Rule 40(1)(d)(2) of the Rules of this Court.

[2] "J. App." denotes Appendix A, the opinion below, attached to the Jurisdictional Statement.

Ms. Rawlinson was interested in becoming a correctional counselor for the State of Alabama. However, the state by statute requires that to qualify for this position, an applicant must be at least 5 feet 2 inches and 120 pounds; Ms. Rawlinson did not meet the weight requirement. (J. App. 24, 27). In addition, the state by regulation has established a policy of not hiring women as correctional counselors in contact positions in all-male penitentiaries. (J. App. 25). When Ms. Rawlinson's application for a position as correctional counselor was rejected, she filed a charge with the Equal Employment Opportunity Commission and, after the requisite period of time had elapsed, she received her "right to sue" letter. (J. App. 30-31). Consequently, Ms. Rawlinson was entitled to bring her suit for employment discrimination under Title VII, and she did so. (J. App. 32).

A three-judge district court was convened pursuant to 28 U.S.C. § 2281[3] "[b]ecause a statute and administrative orders of the Statae of Alabama [were] challenged on constitutional grounds, and injunctive relief [was] sought against state officials." (J. App. 17). The court concluded:

> that Ms. Mieth and her class were denied equal protection of the laws because the 5'9", 160 pound requirement for state troopers was intentionally discriminatory against women, and is "not rationally related to the achievement of any legitimate state interest." In its holding, the court applied the equal protection analysis as elucidated, with regard to employment discrimination, in *Washington* v. *Davis*, ... U.S. ....., 44 U.S.L.W. 4789. (J. App. 39).

[3] This statute, 28 U.S.C. § 2281 was repealed on August 12, 1976. Pub.L. 94-381, § 1, 90 Stat. 1119. Section 7 of Pub.L. 94-381 provides that the repeal "shall not apply to any action commenced on or before the date of enactment."

2. that "the height and weight requirements have been discriminatorily applied in the case of Ms. Rawlinson in violation of Title VII." (J. App. 42).

3. that "Regulation 204, insofar as it denies women jobs as prison guards in all-male prisons, is violative of Title VII and the Equal Protection Clause." (J. App. 45).

Only the latter two rulings have been appealed. (Jurisdictional Statement, at 4.) Therefore, Ms. Mieth's contentions, involving solely constitutional issues, are not before this Court.

ARGUMENT

Although this case apparently began with a single complaint, in fact the situations and contentions of the two plaintiffs were entirely distinct. Ms. Mieth and Ms. Rawlinson were interested in different jobs, administered by different state agencies, and were faced with different barriers to employment. In addition, Ms. Meith, because she had failed to comply with the procedural requirements of Title VII, had only a constitutional claim available to her, while Ms. Rawlinson could, and did, pursue her claim under Title VII.

Clearly, convening the three-judge court was proper with regard to Ms. Mieth's claims. For, under former 28 U.S.C. § 2281, in effect at the time this case was brought and decided, such a court was necessary when a suit was filed seeking to enjoin a state officer on constitutional grounds from enforcing a state statute.

Just as clearly, however, under recent decisions of this Court, it was at least the preferable course, with regard to Ms. Rawlinson's contentions, for the single judge with

whom the complaint was originally filed to proceed to decide the Title VII questions. Insofar as vindication of Ms. Rawlinson's Title VII claims merited enjoining the application of a statute or an administrative regulation, the injunction resulted from application of the Supremacy Clause of the Constitution. Injunctions based upon Supremacy Clause claims did not require action by a three-judge court under former § 2281 (*Swift & Co.* v. *Wickham*, 382 U.S. 111), and this Court has announced that "it was the preferred practice for a single judge, when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court." *Philbrook* v. *Glodgett*, 421 U.S. 707, 712-13 n. 8, relying on *Hagans* v. *Lavine*, 415 U.S. 528; see also *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 807 (White, J., concurring in the result).

It is important, in this regard, that this case was decided after this Court's decision in *Washington* v. *Davis, supra.* For *Washington* announced the rule that, to prevail in an employment discrimination case against a governmental entity based upon the equal protection guarantee, it is insufficient to demonstrate, as it often is under Title VII (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424), a differential impact upon disparate groups not justified by a business necessity; rather, an intent to discriminate must be shown.

Also revelant is the fact that, unlike racial discrimination, gender-based discrimination has not been declared inherently suspect; therefore, while an important state interest is required to justify such discrimination when attacked as a violation of equal protection, a compelling state interest is not necessary. *Craig* v. *Boren*, —— U.S. ——, 45 U.S.L.W. 4057; *cf. Reed* v. *Reed*, 404 U.S. 71. On

the other hand, under Title VII sex discrimination is treated exactly like race discrimination, with the sole exception of the availability of the bfoq defense. Since that defense requires that the gender qualification be "necessary" to the business asserting the defense, the Title VII standard is clearly at least as stringent as that imposed in sex discrimination cases under the equal protection guarantee.

As a result of the confluence of these two constitutional doctrines, an sex discrimination in employment claim against a state agency based upon the equal protection clause is necessarily superfluous where a claim under Title VII is also available; the constitutional claim cannot succeed if the Title VII contention fails. Under these circumstances, the fact that the plaintiff alleges violation of both Title VII and the equal protection clause, as Ms. Rawlinson did, ought not to influence the entire course of the litigation, by permitting the convocation of a three-judge court and a direct appeal to this Court in a case which is in actuality nothing but a Title VII case.

This Court, in *MTM* v. *Baxley, supra,* held that "a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court *denying* interlocuatory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim." 420 U.S., at 804 (emphasis supplied). The Court noted that if a direct appeal were not permitted,

> "[d]iscretionary review in any case would remain available, informed by the mediating wisdom of a court of appeals. Furthermore, the court of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most

mandatory appeals in summary fashion. [*Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 99,]

• • •

"It is certain that the congressional policy behind the three-judge court and direct-review apparatus—the saving of state and federal statutes from improvident doom at the hands of a single judge—will not be impaired by a narrow construction of § 1253. A broad construction of the statute, on the other hand, would be at odds with the historic congressional policy of minimizing the mandatory docket of this Court in the interest of sound judicial administration. *Phillips* v. *United States,* 312 U.S. 246, 250-251, 85 L. Ed. 800, 61 S. Ct. 480 (1941); *Gonzalez v. Employees Credit Union, supra,* at 98." (421 U.S., at 803-804.)

MTM, of course dealt only with situations in which an injunction was *denied;* here, the injunction was granted. And in *Philbrook* v. *Glodgett, supra,* the Court said:

> "In *Hagans* v. *Lavine,* this Court indicated that it was the preferred practice for a single judge, when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court. The District Court in this case was unable to proceed in that manner because appellees raised only constitutional contentions in their complaint • • • and raised their statutory contention, for the first time, at oral argument before the three-judge court. • • • Appellant Weinberger urges us to reconsider our decision in *Engineers* v. *Chicago, R. I. & P. R. Co.* 382 U.S. 423 • • • in which we held that, if a three-judge court is convened and decides a case on statutory grounds, the judgment may be appealed to this Court under 28USC § 1253, but we decline to do so." (421 U.S., at 712-713 n. 8.)

Here, however, there was no impediment to proceeding in the manner preferred—that is, by having the single judge decide Ms. Rawlinson's Title VII contentions. Moreover, while the single judge here was theoretically presented "with both statutory and constitutional grounds for decision," in fact, as we have explained, no constitutional issue could remain in Ms. Rawlinson's case once the statutory issue was determined. Requiring an appeal to the Court of Appeals in the *Philbrook* situation could indeed present serious problems; if the Court of Appeals determined that the statutory claim was without merit, it would be without jurisdiction over the constitutional claim which remained, and a new round of litigation would be necessary. Here, since no constitutional issue would remain, this would not occur.

Because of the fortuity that Ms. Rawlinson's contentions were joined with another, separate cause of action in which convocation of a three-judge court was clearly proper, the decision to ignore the strong recommendations of *Hagans* is possibly explicable.[4] And, perhaps, had the state determined to appeal the entire case, there would have been a net saving in expenditure of judicial resources in permitting a direct appeal of Ms. Rawlinson's essentially Title VII case,

[4] *MTM* makes clear that the determination whether an appeal from a three-judge court which does not reach the merits of a constitutional claim ought to be a direct appeal to this Court does not necessarily require a determination that the three-judge court was without jurisdiction in the first instance. Therefore, it is not necessary here to decide that the three-judge court ought not to have reached the issues tendered by Ms. Rawlinson; it is sufficient to a decision that the present appeal is improper that a single judge *could* have decided the Title VII questions.

as well as Ms. Mieth's constitutional case.

As matters stand, however, there is no reason for permitting appellants to forego the ordinary route for appealing a Title VII case.[5] Indeed, to allow the direct appeal would be basically contrary to the decision Congress made in 1972 when it covered state and municipal employment under Title VII—that employment discrimination claims against public employers are to be treated under federal law precisely in the same way as are such claims against private employers. Moreover, it would appear that Congress, by repealing § 2281 as to future cases, has approved the thrust of this Court's decisions in *MTM, supra,* and *Gonzalez, supra*—that cases should ordinarily be aired in full before a Court of Appeals.

Therefore, without overruling the doctrine this Court declined to disturb in *Philbrook, supra,* this Court should announce that a direct appeal is available only if the constitutional issue will remain in the case once the statutory issue is decided. Appellants should consequently be directed to appeal to the Court of Appeals for the Fifth Circuit, with the right, of course, to file a petition for certiorari in his Court should the district court be affirmed on appeal.

[5] The three-judge court did, in determining the validity of Regulation 204, announce that it violated *both* Title VII and the Equal Protection clause. However, the analysis which led to this result seems to be entirely a Title VII analysis; and, as noted above, the Equal Protection decision could not stand if the Title VII determination were overruled. Moreover, having decided the Title VII issue, there was no reason whatever to decide the constitutional question and, in the interest of judicial restraint, that question should not have been reached *Hagans, supra.* Thus, the fact that the three-judge court purportedly decided a constitutional question ought not to influence the result.

CONCLUSION

For the reasons stated above, the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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